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No. 85-1538

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly upheld the admission of co-conspirator declarations without first determining that they were reliable.

2. Whether out-of-court statements of petitioner's co-conspirators were made in furtherance of the conspiracy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 778 F.2d 963. The opinion of the district court denying posttrial motions (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984)) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on December 6, 1985. A petition for rehearing was denied on January 9, 1986 (Pet. App. 46a-48a). The petition for a writ of certiorari was filed on March 10, 1986. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); racketeering conspiracy, in violation of 18 U.S.C. 1962(d); and extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner was sentenced to concurrent terms of eight years' imprisonment on the two racketeering counts and on one of the Hobbs Act counts. A consecutive term of three years' probation was imposed on the remaining Hobbs Act count. The court of appeals affirmed (Pet. App. 1a-41a).

1. The evidence at trial showed that from late 1979 through 1984, many top-ranking members of the Philadelphia Police Department operated a scheme to extort protection payments from numbers operators and vendors of illegal video poker machines throughout Philadelphia. The members of the conspiracy ranged from Deputy Commissioner James Martin, the second-ranking official in the Department, to officers on the beat. Petitioner, a lieutenant in the Department, collected $575 per month from numbers writer Lester Barry. He also collected payments from poker machine vendor William Dawley. Petitioner kept a portion of the money and turned over the remainder to Joseph DePeri, the inspector in charge of the Northwest Police Division. DePeri explained to his vice lieutenant, Joseph Alvaro, that he was permitting petitioner to pick up the payoffs from several operations in the Northwest Division so that petitioner could make extra money for himself

(C.A. App. 1259a-1261a, 1272a-1273a, 2052a-2053a, 2833a).[1]

Petitioner resigned from the force in March 1983 after learning that his personnel records had been subpoenaed by a federal grand jury. The following year, Alvaro was cooperating with the government in the investigation and had discussions with DePeri and Deputy Commissioner Martin. Those discussions were recorded with Alvaro's consent. The men discussed the destruction of records pertaining to the extortion scheme. They also discussed the payment of "hush money" to Al Ricci, who had been collecting payoffs for the members of the Department. Through Alvaro, Martin promised not only to pay "hush money" to Ricci, but also to pay Ricci's prospective tax liabilities up to $40,000, and his legal fees up to $50,000 (C.A. App. 1607a, 1615a, 1623a-1624a, 1640a, 2188a-2191a, 2198a-2200a, 2404a-2405a). In one conversation between Alvaro and DePeri, there was a fleeting reference to petitioner as one of the police officers who would be indicted; otherwise the conversations did not refer to petitioner at all (C.A. App. 2287a-2290a). All of the taped discussions that were played at trial took place on or before March 25, 1984 (C.A. App. 2404a-2405a). The extortion of payoffs from numbers writers continued into April 1984 (C.A. App. 2019a-2020a).

2. On March 8, 1984, petitioner and 12 other present and former police officers were named in a 57-count indictment charging Hobbs Act and RICO violations. Two months later, an 86-count superseded-

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[1] Our statement of facts is taken from the brief filed by the government in the court of appeals. The citations to "C.A. App." refer to the appendix that was filed in that court.

ing indictment was returned adding three defendants and obstruction of justice charges against Martin and DePeri. The obstruction charges were also embraced in the RICO conspiracy count.

At trial, petitioner objected to the admission of the taped conversations between Alvaro and codefendants DePeri and Martin on the ground that he had withdrawn from the conspiracy the previous year when he resigned from the Police Department. He therefore claimed that he was no longer a member of the conspiracy when the obstruction of justice took place. The district court held that petitioner's mere resignation from the police force was insufficient to constitute withdrawal from the conspiracy as a matter of law. The court submitted the issue of withdrawal to the jury with appropriate instructions (C.A. App. 4449a-4451a). The court also directed the jury to disregard any evidence against a defendant that occurred after the date the defendant withdrew from the conspiracy, if he withdrew at all (C.A. App. 4450a).

In its opinion denying various posttrial motions, the district court rejected an argument that the Confrontation Clause required exclusion of Martin's tape-recorded statements. The court applied the rule of *United States* v. *Ammar*, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983), that an out-of-court statement "must bear 'sufficient indicia of reliability' to demonstrate its trustworthiness" (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984) (quoting *Ammar*, 714 F.2d at 255)). The court found it "beyond dispute that the statements are sufficiently reliable, since they are actually the words of defendant Martin himself" (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984)).

3. On appeal, petitioner claimed that Alvaro's taped conversations with DePeri and Martin were not admissible as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) because they were not made in furtherance of the conspiracy and were made after petitioner withdrew from the conspiracy (Katz Br. 27-30). Two other defendants, whose arguments Katz adopted by reference, argued that admission of the taped conversations violated the Confrontation Clause because the tapes were made after they had withdrawn from the conspiracy (Morrell Br. 43-45; Murphy Br. 45-47). No defendant argued that the Confrontation Clause was violated on the ground that the statements were unreliable.

The court of appeals found that, although petitioner had resigned from the Department in March 1983, he produced no evidence showing that he had abandoned the enterprise or that he had communicated his abandonment to his co-conspirators. The court noted that some police officers who resigned during the grand jury investigation continued to collect payoffs from the vendors and numbers operators after their resignations. Thus, there was no reason to equate the mere act of resigning from the Department with withdrawal from the conspiracy. Pet. App. 31a. The court then concluded that the taped conversations were properly admitted against petitioner because the district court had reasonable grounds to find that petitioner was an active participant in the conspiracy at the time of the conversations (*id.* at 33a).

The court further held that the DePeri and Martin statements were made in furtherance of the conspiracy (Pet. App. 34a). To the extent that Martin discussed the grand jury investigation, the selection of

counsel, and the need for character witnesses in his conversations with Alvaro, he sought to further the ends of the conspiracy by providing reassurance to a co-conspirator and informing that co-conspirator of the current status of the conspiracy (*ibid.*).

The court specifically rejected the Confrontation Clause argument made by Morrell and Murphy (Pet. App. 34a-36a). In addition to rejecting the claim on the merits, the court concluded that "appellants did not suffer any prejudice from the introduction of the statements" (*id.* at 35a).

ARGUMENT

1. Petitioner now claims (Pet. 9) that the admission of Alvaro's taped conversations with DePeri and Martin violated his Sixth Amendment right of confrontation because the court of appeals failed to apply the "reliability test" to these statements, as was required by its own decision in *Ammar*, 714 F.2d at 255-256. The court of appeals, however, had no occasion to inquire into the reliability of the recorded statements, because no defendant challenged the district court's conclusion that they were reliable. Nor does petitioner do so even now.[2]

The Third Circuit has held that co-conspirator statements admissible under Fed. R. Evid. 801(d)

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[2] Both courts below found that the statements were made by members of the conspiracy, during the course of the conspiracy, and in furtherance of the conspiracy. Petitioner does not suggest what additional indicia of reliability are needed in order to admit a co-conspirator declaration. Nor does he suggest that the particular statements at issue in this case were unreliable. In these circumstances, there is no reason for the Court to address the purely hypothetical question posed by petitioner.

(2)(E) do not automatically satisfy the Confrontation Clause, but must also be assessed for "indicia of reliability" (*Ammar*, 714 F.2d at 255-256). This is the very rule for which petitioner contends. Had he asked the Third Circuit to determine whether there were such indicia of reliability in this case, it would have been required by its own precedent to do so. Having made no such request, he cannot complain of the court's failure to address the issue. See *United States* v. *Gibbs*, 739 F.2d 838, 846-848 (3d Cir. 1984) (en banc).[3]

2. Petitioner also challenges (Pet. 10-11) the finding of the court of appeals that the taped statements of DePeri and Martin were made "in furtherance of the conspiracy." Citing *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Lutwak* v. *United States*, 344 U.S. 604 (1953); and *Krulewitch* v. *United States*, 336 U.S. 440 (1949), petitioner argues that these statements did not fall within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) because they were made during the "concealment phase" of the conspiracy. There is neither a legal nor a factual basis for petitioner's claim.

Petitioner has conflated two distinct requirements of Rule 801(d)(2)(E). One requirement is that the statement be made "in furtherance of the conspiracy" (see 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 347-357 (1980)). The court of appeals

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[3] If a "reliability" issue had been properly raised before the court of appeals, it would not be reasonable to infer from the court's silence, as petitioner suggests (Pet. 9), that the panel had sub silentio overruled *Ammar*. A far more reasonable inference would be that the court of appeals had found the district court's reliability determination to be so clearly correct as not to warrant discussion.

correctly relied on its own decision in *Ammar*, 714 F.2d at 252, for the proposition that statements such as those made by DePeri and Martin are "in furtherance" of the conspiracy. See also *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 2-3 (statements made by co-conspirators about the police investigation of their crime were admitted as statements made in furtherance of the conspiracy).

A separate requirement, addressed in *Lutwak* and *Krulewitch*, is that the statement be made "during the course" of the conspiracy (see 4 D. Louisell & C. Mueller, *supra*, § 427, at 337-347). In *Lutwak* and *Krulewitch*, this Court held that out-of-court statements of a conspirator are inadmissible in a federal conspiracy trial if the statements are made after the conspiracy has ended and "during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise" (*Dutton* v. *Evans*, 400 U.S. at 81 (opinion of Stewart, J.)). In this case, however, the conspiracy had not ended when Alvaro conversed with DePeri and Martin in February and March 1984. On the contrary, members of the Department were still extorting protection payments until April 1984, and Martin was using some of the extorted money to buy Ricci's silence. Thus, the obstruction of justice occurred during the course of the extortion conspiracy. Both crimes, in turn, formed the basis of the racketeering conspiracy charge.

In any case, petitioner was not prejudiced by the admission of the recorded statements. Petitioner's Hobbs Act and racketeering convictions were firmly based on the undisputed testimony of the two men from whom petitioner collected protection payments. His convictions did not rest in any way on the con-

versations that were recorded in 1984, from which the jury learned nothing more about petitioner than that other defendants expected him to be indicted.[4] In these circumstances, where the taped conversations did not contribute to petitioner's convictions, his substantial rights were not affected by the admission of that evidence, and there is no reason to review his hearsay claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Of course, by virtue of petitioner's presence at trial, the jury knew that he had been indicted, and therefore it learned nothing new from that portion of the recorded statements. Indeed, this excerpt was not admitted to prove the truth of the matter asserted, namely, that petitioner would be indicted. Accordingly, the statement was not hearsay to begin with (Fed. R. Evid. 801(c)). Furthermore, because the district court charged the jury that an indictment should not be considered as evidence of guilt (C.A. App. 2441a-2442a), petitioner surely suffered no prejudice from this fleeting reference to his name in the taped conversations.

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